IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 12

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC, JEAN NEBBIA and ANTHONY SUTERA,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	PAGE
INTRODUCTORY	1
RETROACTIVITY OF THE KATZ DECISION	2
THE QUESTION PERSISTS IN ANY EVENT AS TO WHETHER THE ELECTRONIC EAVESDROPPING IN THIS CASE COMPLIED WITH PRE-KATZ STANDARDS	6
CONCLUSION	7

Cases Cited

Goldman v. United States, 316 U. S. 129	4
Griffin v. California, 380 U. S. 609	4
Johnson v. New Jersey, 384 U. S. 719	4, 4fn
Katz v. United States, No. 35, this Term, decided December 18, 1967	1-7
Linkletter v. Walker, 381 U. S. 618	4
Olmstead v. United States, 277 U. S. 438	3
People v. Ballott, 20 N. Y. 2d 600 (1967)	4fn
Stovall v. Denno, 388 U. S. 293	4, 4fn, 5
Tehan v. Shott, 382 U. S. 406	4

United States Constitution Cited

Fourth Amendment	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 909

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC, JEAN NEBBIA and ANTHONY SUTERA,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT REPLY BRIEF FOR PETITIONERS

Introductory

The Brief in Opposition urges that *Katz* v. *United States,* No. 35, this Term, decided December 18, 1967 should not be applied to this case. The Government con-

cedes that "the principle announced in *Katz*" would preclude "affirmance of petitioners' convictions", but the Government states that "application of the *Katz* holding to prior cases is not warranted." Br. Opp. 9.

Our joint petition for certiorari herein was filed December 12, 1967, six days before this Court decided *Katz*. This reply brief affords the first occasion for us to brief the question of retroactivity of *Katz*.

Retroactivity of the Katz Decision

The retroactivity question here has three aspects: (1) What does "retroactive" mean, *factually*, when *Katz* and our case are considered in juxaposition? (2) What result does precedent favor? (3) What result does policy, which means *constitutionally just* policy, favor?

(1) Our joint petition for certiorari, as above mentioned, was already pending in this Court when *Katz* was decided. Exactly seven months before the Court below in our case rendered its decision affirming the narcotics convictions (October 13, 1967), that Court and all the world knew that this Court had granted certiorari in *Katz* (March 13, 1967). Another operative "constitutional fact" of interest here is that the non-trespassory electronic spying which this Court condemned in *Katz* took place a considerably longer time ago than the claimedly non-trespassory electronic spying in our case; the *Katz* eavesdropping took place in February 1965 (369 F. 2d at p. 131); the eavesdropping in our case took place in December 1965. Which Judge or which lawyer would relish the task of explaining to an intelligent layman exactly why an act of electronic snooping done in February 1965 stands constitutionally condemned, but an indicatedly much more obnoxious bit of electronic snooping done nearly ten months later may not be thus condemned, and that the reason

has to do with a dislike for "retroactivity"? Shall the present petitioners who were electronically spied upon nearly ten months after Charles Katz was, be denied constitutional protection because, through the vagaries of Court procedure, our case lost a race with *Katz* towards United States Supreme Court certiorari?

The ardor with which governmental prosecutors of late have been litigating and ratiocinating about the question of "retroactivity" in situations of this sort is generating a strange atmosphere of constitutional unreality, indeed of common sense unreality. We do not deny that when official prosecutors are confronted with a retroactivity ruling of this type inconvenience can result. But before simplistically moving to avert such inconvenience courts ought to take account of particular fact situations presented to them rather than to decree flat unvarying rules of prospectivity.

Our case is before this Court now; and, again, it was lodged in this Court before *Katz* was decided. Our case is not off somewhere in a "category" of which a merely statistical or abstract general view may be taken. And we might mention also that, from its active litigational inception in May 1966, when the pre-trial motions began, our case has expressly thrust forward the electronic eavesdrop issues, and has continued to do so at all subsequent stages. Thus, our case actively involved the electronic eavesdrop issue nearly a year before certiorari was granted in *Katz*.

(2) Precedent does not help the Government's position here. In fact, as we read the *Katz* decision itself the Court has apparently already indicated its view as to the retroactivity question; we refer to the Court's rejection in *Katz* of the Government's argument that because its agents relied on *Olmstead* v. *United States*, 277 U. S. 438 and

Goldman v. *United States,* 316 U. S. 129, the Court should retroactively validate their conduct. *Linkletter* v. *Walker,* 381 U. S. 618 held that the *Mapp* rule did not operate retrospectively upon cases finally decided prior to *Mapp;* that does not justify what the Government here seeks, because *Katz* was decided while our case was (is) still pending. *Tehan* v. *Shott,* 382 U. S. 406 laid down a similar rule as to the principle of *Griffin* v. *California,* 380 U. S. 609; therefore, *Tehan* no more than *Linkletter* justifies what the Government here seeks with respect to our case. *Johnson* v. *New Jersey,* 384 U. S. 719 held that the *Escobedo* and *Miranda* decisions were applicable only to cases in which trial began after the decisions were announced, and *Stovall* v. *Denno,* 388 U. S. 293 made the "lineup" rule of the *Wade* and *Gilbert* cases applicable only from the date of the decision in *Stovall. Johnson* and *Stovall,* then, do concededly apply rules of prospectivity which would prevent us from having the benefit of *Katz,* but the problems of just constitutional policy need to be considered, a topic which we take up in our next paragraph.*

(3) Policy, just constitutional policy, strongly favors applying *Katz* "retroactively", in any event to this case. The Government emphasizes prosecutive inconvenience and that law enforcement officers have relied in good faith on pre-*Katz* decisions. Perhaps the first thing that should be mentioned is that electronic snooping is offensive to public morality and taste since it involves the odious busi-

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* The *Stovall* rule, incidentally, is not being applied inflexibly; where a fundamental denial of due process has occurred in a pretrial identification procedure "retroactive" relief may be granted. *People* v. *Ballott,* 20 N. Y. 2d 600 (1967). Nor, apparently, is this Court's *Johnson* decision preclusive where a claim of involuntary confession is involved. 384 U. S. at 730.

ness of secretly invading personal privacy, and if social values are to be deemed to be expressed or worthy of being expressed in the constitutional principles of law enforcement in a civilized modern country, it is entirely justifiable to say that electronic eavesdropping affects the plainest constitutional decencies and indeed in a large sense affects "the integrity of the truth-determining process". *Stovall* v. *Denno*, 388 U. S. 293, 298.

The concern of just constitutional policy should not be primarily with governmental administrative convenience, or even with serious burdensomeness in performance of governmental tasks. The foremost concern should be with *rightness* of governmental conduct. *Katz* says, in effect, that non-trespassory electronic snooping is constitutionally evil because it attacks the constitutional good of individual privacy which *Katz* says the Fourth Amendment protects in such an encounter. The Government does not even claim in this case that there are more than a few cases in which police would be disappointed if *Katz* is made retroactive (Br. Opp. 12). The Government's theme is that police should be allowed to retain the victories they have won through non-trespassory electronic eavesdropping, first because the police thought they were acting lawfully, and second because the cases have been big, important cases. Our answer to the first of these arguments is that police have had plenty of cause for some years now to feel unsure about the continuing "lawfulness" of such non-trespassory snooping; conspicuous public agitation, on many social and institutional levels, has been going on concerning this problem for several years. Another answer is that it is unseemly as a matter of constitutional values and public morality, to make the victim rather than the wrongdoer bear the impact of the choices which this Court may make as to prospectivity versus retroactivity in a case of the present kind. Still another

answer may be made in terms of the familiar idea of deterrence of wrongful police conduct; that is, it is cynical to let policemen go on using a morally and legally questionable method of investigation down to the last possible moment until a Court of final jurisdiction decides to stop them. Electronic snooping is *par excellence* the sort of police activity which should not retrospectively condoned in this manner which *undeterred* police zealots are constantly counting on and piously go on rationalizing about. As for the second branch of the Government's theme above mentioned, that police should be allowed to keep a major triumph like the convictions in this case, such reasoning would allow them to keep any such triumph no matter by what monstrous constitutional violations obtained; it is one of those arguments which proves too much.

We respectfully suggest that the *Katz*-retroactivity issue presented by our case is too important a constitutional issue to be left to a ruling by way of an order denying certiorari, as the Government is here asking the Court to do. The issue should be briefed, argued and decided on the merits, through the granting of certiorari in this case.

The Question Persists in any Event as to Whether the Electronic Eavesdropping in this Case Complied With Pre-*Katz* Standards.

The Government in its Brief in Opposition (pp. 13-15) argues the issue which we have tendered in our joint petition as to whether the District Court correctly found that the Waldorf-Astoria electronic eavesdropping in our case complied with pre-*Katz* standards. It will be recalled that when the Court of Appeals remanded our case to the District Court for a hearing on electronic eavesdropping it expressly excluded the Waldorf-Astoria episode (on which petitioners' convictions depend) because there had been a pre-trial hearing on that episode. Our petition for cer-

tiorari contests the adequacy of that pre-trial hearing on numerous grounds, not limited to the issue of "trespass". The Court of Appeals should have granted us a remand as to the Waldorf-Astoria episode. There is too much in that episode which remains unsatisfying. Certiorari should be granted here if only for the purpose of remanding for a further hearing as to the Waldorf-Astoria eavesdropping. Indeed, without first resolving the issues we have raised as to the pre-*Katz* lawfulness of that eavesdropping, it is hard to see how the retroactivity question as to *Katz* can be decided either way for our case, because if we are right about the Waldorf-Astoria activity we should receive certiorari irrespective of *Katz*.

CONCLUSION

It is respectfully submitted that the joint petition for certiorari should be granted.*

Respectfully submitted,

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* At p. 13 of the joint petition for certiorari we stated that we expected to make a motion in this Court for permission to file nine copies of a special appendix or compilation of the pertinent record items on the electronic issues. Our clients are all in jail, and we have been unable to overcome thus far the financial difficulties of obtaining such an appendix or compilation, which would be a heavy expense. We apologize to the Court.